

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1396

INTRODUCER: Senator Aronberg

SUBJECT: Administration of Estates

DATE: March 10, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Favorable
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

This bill is the result of the recommendations of the Real Property, Probate, and Trust Law Section of the Florida Bar to improve and clarify current Florida law pertaining to the administration of estate of decedents and the Florida Uniform Disclaimer of Property Interests Act. The bill makes the following changes:

- Provides a definition of “minor” for purposes of the Probate Code;
- Amends the statute of limitations for determining paternity in probate proceedings;
- Makes clarifications to provisions addressing the elective share;
- Modifies provisions relating to the assessment of attorney’s fees and costs when a request for the elective share is withdrawn, and adds a provision for the assessment of fees and costs when an election is not made in good faith;
- Updates limitations on exempt property by (1) increasing the dollar limitation on household goods from \$10,000 to \$20,000, (2) changing personal automobile limitation to “motor vehicle” limitation based on gross weight and limit the exempt to two motor vehicles, and (3) including all qualified tuition plans authorized by Internal Revenue Code s. 529;
- Clarifies that, in instances in which the petitioner for summary administration is also the trustee of a trust that is a beneficiary of the decedent’s estate, the beneficiaries of the trust are to be made aware of the petition for summary administration;
- Adds a savings provision to the Florida Uniform Disclaimer of Property Interests Act (FUDPIA) intended to protect practitioners from inadvertently disqualifying certain post-mortem disclaimers under relevant sections of the Internal Revenue Code;

- Modifies provisions of the FUDPIA to add consistency and correct minor typographical errors; and
- Adds a provision to ensure that the traditional statutory prohibition on disclaimers by insolvent beneficiaries remains unquestionably intact.

This bill substantially amends the following sections of the Florida Statutes: 731.201, 732.108, 732.2025, 732.2045, 732.2075, 732.2085, 732.2135, 732.402, 733.201, 733.504, 733.602, 735.203, 739.102, 739.104, 739.201, 739.207, 739.402, 739.501, 660.417, 736.0802, and 895.02.

II. Present Situation:

General Definitions under Probate Code

The general definitions section of the probate code, s. 731.201, F.S., provides definitions of the parties, elements, and instruments involved in the probate process. The Real Property, Probate, and Trust Law Section of the Florida Bar recommended that a definition of “minor” be added to this definitions section. The term “minor” is used in several different places in the probate code without being defined.¹

Determination of Paternity in Probate

In cases where a person dies without a will, an estate passes by intestate succession to the decedent’s heirs. Heirs are persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent. In cases where the heirs are born out of wedlock, the person is considered a descendant of his or her mother and is one of the natural kindred of all the members of the mother’s family. The person is also considered a descendant of his or her father and is one of the natural kindred of all members of the father’s family, if:

- The natural parents participated in a marriage ceremony before or after the birth of the person;
- The paternity of the father is established before or after the death of the father; or
- The paternity of the father is acknowledged in writing by the father.²

The statute of limitations for determining paternity has been interpreted by the Florida Supreme Court to be four years as set forth in s. 95.11, F.S. In the case of *Estate of Smith v. Scruggs*, 685 So. 2d 1206 (Fla. 1996), an alleged daughter of a decedent petitioned for revocation of probate claiming in part that she was the natural daughter of the decedent and she would inherit under the laws of intestacy if the will were revoked. The trial court dismissed the petitioner’s claim, finding that the statute of limitations as set forth in s. 95.11(3)(b), F.S., barred the petitioner’s claim. In a final appeal, the Florida Supreme Court affirmed the lower court’s decision. The Court stated that a prior holding by the Florida Supreme Court and the 1986 amendment by the Legislature to s. 95.11(3)(b), F.S., to accommodate the prior decision of the Court were evidence

¹ See ss. 731.201(21) and 731.303(4), F.S.

² Section 732.108(2), F.S.

of the fact that s. 95.11(3)(b), F.S., was still the appropriate statute of limitations law to apply in paternity actions brought in probate cases.

Elective Share

The elective share in probate allows the surviving spouse of a decedent who lives in Florida to take 30 percent of the fair market value of all assets subject to the administration of the estate except for real property not located in Florida.³ The elective share is paid from the estate, if not provided for in the will, from the following sources in the following order:

- Proceeds of any term or other life insurance policy;
- Proceeds from a pension, retirement, or deferred compensation plan;
- One half of the community property as described in s. 732.2045(1)(f), F.S.;
- Property held for the benefit of the surviving spouse in a qualifying needs trust;
- Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse;
- Property interests that would have satisfied the elective share but were disclaimed.⁴

If the elective share is not fully satisfied from these proceeds, the law provides that the unsatisfied balance may be apportioned among other direct recipients in the following order of priority:

- The decedent's probate estate and revocable trust;
- Recipients of property interests, other than protected charitable interests;
- Recipients of all other property interests, other than protected charitable interests, included in the elective estate;
- Recipients of protected charitable lead interests, but only to the extent and at such times that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws.⁵

Timetable for Filing for the Elective Share

The request for the elective share must be filed on or before the earlier of the date that is six months after the date the notice of administration was served on the surviving spouse (or his or her representative), or the date that is two years after the date of the decedent's death.⁶ The surviving spouse may petition the court for an extension of time during this period for good cause.⁷ The surviving spouse may withdraw an election on or before the earlier of the date that is eight months after the date of the decedent's death or the date of a court order of contribution. If an election is withdrawn, the court may assess attorney's fees and costs.⁸

³ Section 732.2065, F.S.

⁴ Section 732.2075(1), F.S.

⁵ Section 732.2075(2), F.S.

⁶ Section 732.2135(1), F.S.

⁷ Section 732.2135(2), F.S.

⁸ Section 732.2135(3), F.S.

Property Exempt from Claims

If a decedent was domiciled in Florida and died intestate, the surviving spouse is entitled, or, if there is no surviving spouse, the children of the decedent are entitled, to the following property without it being subject to any claims:

- Household furniture, furnishings, and appliances up to a net value of \$10,000;
- All automobiles held in the decedent's name and regularly used by the decedent or member of the immediate family as their personal automobiles;
- Florida Prepaid College Program contracts;
- All benefits paid to the designated beneficiary of teachers and school administrators who are killed or injured and die during the performance of their teaching or administrative duties as described in s. 112.1915, F.S.⁹

Probate of Small Estates

A summary administration of an estate is appropriate for a resident or a nonresident if the decedent's will does not direct administration as required by ch. 733, F.S., or the value of the estate, less the value of exempt property from the claims of creditors, does not exceed \$75,000 or the decedent has been dead for more than two years.¹⁰

Any beneficiary or person nominated as personal representative may petition for summary administration. The surviving spouse, if any, and any beneficiary must sign and verify the petition.¹¹ If one of these persons has died, is incapacitated, or is a minor, or has conveyed or transferred all interest in the estate, then the petition must be signed and certified by:

- The personal representative, if any, of a deceased person or, if none, the surviving spouse, if any, and the beneficiaries;
- The guardian of an incapacitated person or a minor; or
- The grantee or transferee of any of them shall be authorized to sign and verify the petition instead of the beneficiary or surviving spouse.¹²

If a beneficiary will receive full distributive share under the proposed distribution, then joinder in, or consent to, a petition for summary administration is not required.

Florida Uniform Disclaimer of Property Interests Act

The Florida Uniform Disclaimer of Property Interests Act applies to disclaimers of any interest in or power over property and is the exclusive means to make a disclaimer under Florida law (except as provided in s. 739.701, F.S., for certain interest in or power over property existing on July 1, 2005, when the time for filing a disclaimer under prior law has not expired).

⁹ Section 732.402, F.S.

¹⁰ Section 735.201, F.S.

¹¹ Section 735.203, F.S.

¹² Section 735.203, F.S.

Disclaiming an interest in property takes effect at the time the instrument creating the interest becomes irrevocable or, if the interest arose under the law of intestate succession, at the time of the intestate's death and passes according to terms of the instrument creating the interest.¹³

If the instrument does not provide for how the property should be disposed of, then the following rules apply:

- If the disclaimant is an individual, the disclaimed interest passes as if the disclaimant had died immediately before the interest was created, unless under the governing instrument the disclaimed interest is contingent on surviving to the time of distribution;
- If the disclaimant is not an individual, it passes as if the disclaimant did not exist;
- Upon the disclaimer of a preceding interest, a future interest held by a person who is not a disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution.¹⁴

III. Effect of Proposed Changes:

This bill is the result of the recommendations of the Real Property, Probate, and Trust Law Section of the Florida Bar to improve and clarify current Florida law pertaining to the administration of estates of decedents and the Florida Uniform Disclaimer of Property Interests Act. The bill makes the following changes:

- Provides a definition of “minor” for purposes of the Probate Code;
- Amends the statute of limitations for determining paternity in probate proceedings;
- Makes clarifications to provisions addressing the elective share;
- Modifies provisions relating to the assessment of attorney's fees and costs when a request for the elective share is withdrawn, and adds a provision for the assessment of fees and costs when an election is not made in good faith;
- Updates limitations on exempt property by (1) increasing the dollar limitation on household goods from \$10,000 to \$20,000, (2) changing personal automobile limitation to “motor vehicle” limitation based on gross weight and limit the exempt to two motor vehicles, and (3) including all qualified tuition plans authorized by Internal Revenue Code s. 529;
- Clarifies that, in instances in which the petitioner for summary administration is also the trustee of a trust that is a beneficiary of the decedent's estate, the beneficiaries of the trust are to be made aware of the petition for summary administration;
- Adds a savings provision to the Florida Uniform Disclaimer of Property Interests Act (FUDPIA) intended to protect practitioners from inadvertently disqualifying certain post-mortem disclaimers under relevant sections of the Internal Revenue Code;
- Modifies provisions of the FUDPIA to add consistency and correct minor typographical errors; and
- Adds a provision to ensure that the traditional statutory prohibition on disclaimers by insolvent beneficiaries remains unquestionably intact.

¹³ Section 739.201(1) and (2), F.S. Those provisions, however, do not apply when the disclaimer involves rights of survivorship in jointly held property, property held as tenancy by the entirety, or interest by a trustee.

¹⁴ Section 739.201(3), F.S.

General Definitions under Probate Code

The bill amends the definitions section under s. 731.201, F.S., by deleting the definition of “incompetent” and replacing it with the definition of “incapacitated.” It defines “incapacitated” as a judicial determination that a person lacks the capacity to manage at least some of the person’s property or to meet at least some of the person’s essential health and safety requirements, and provides that a minor shall be treated as being incapacitated.

The bill adds a definition of “minor” and defines it as a person under 18 years of age whose disabilities have not been removed by marriage or otherwise.

Determination of Paternity in Probate

The bill amends s. 732.108, F.S., by specifically providing that ch. 95, F.S., governing limitations of actions, does not apply in determining heirs in a probate proceeding. The Real Property, Probate, and Trust Law (RPPTL) section of the Florida Bar, states that this proposed change

would allow a determination of paternity to be made in a probate proceeding solely for the purpose of proving heirship even if it is after four years from the date the child attained majority. Without this change, current case law prohibits a person from proving that someone is her father, even if she has hard scientific data proving it. Her brother, born to the same father but a different mother, could prove his heirship, if, for example, his parents participated in a marriage ceremony, even if the “marriage” is void. The comparative result is fundamentally unfair and depends entirely on the type of proof the two siblings have.¹⁵

Elective Share

The bill makes clarifying changes to provisions in ch. 732, F.S., regarding the elective share. It amends the definition of “transfer in satisfaction of the elective share” in s. 732.2025, F.S., to include that an irrevocable transfer by the decedent to an elective share trust must be done while the decedent was alive. The RPPTL section states that this change meets the original intent of the statute and that this additional language clarifies that a “transfer in satisfaction of the elective share” means an irrevocable transfer by the decedent during the decedent’s life to an elective share trust.

The bill amends s. 732.2045(1)(f), F.S., to exclude from the elective share the decedent’s one-half of property that is community property in other states that have similar community property law provisions. The RPPTL section states that the surviving spouse is already entitled to one-half of community property consisting of personal property, no matter where its location, and real property in Florida, and that such property is therefore excluded from the elective share

¹⁵ Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Administration of Estates* (2009) (on file with the Senate Committee on Judiciary).

calculation. According to the RPPTL section, it is appropriate to also exclude property which would constitute community property under the laws of another state.¹⁶

The bill amends s. 732.2075, F.S., to change the priority of sources from where the elective share is supplied. It moves s. 732.2075(1)(e), F.S., which provides for the elective share to be paid from property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse to s. 732.2075(1)(a), F.S. It also moves the provisions of s. 732.2075(1)(a), F.S., which provides for the elective share to be paid from proceeds of any life insurance policy to s. 732.2075(1)(d), F.S.

It clarifies existing law to provide that the responsibility for the satisfaction of the remaining elective share balance should be apportioned among the direct recipients in each class, with each class only responsible to the extent that the assets in the previous class do not satisfy the remaining elective share balance.

It provides that if the elective share is still not satisfied from the sources identified in s. 732.2075(1) and (2), F.S., the additional amount due to the surviving spouse shall be determined and satisfied, first with the remaining unsatisfied balance from property interests included in the elective share as described in s. 732.2075(1)(a), F.S., and the pension funds described in s. 732.2075(1)(b), F.S. It provides that in determining the amount of the remaining unsatisfied balance, the effect, if any, of any change caused by the operation of calculating the value in ss. 732.2075(1)(a) and (b), F.S., shall be taken into account, including, if necessary, further recalculations of those beneficial interests.

The bill provides that if there is more than one trust to which this section could apply, unless otherwise provided in the decedent's will, the unsatisfied balance must be apportioned pro rata to all such trusts in proportion to the value of the surviving spouse's beneficial interests in the trusts.

The bill provides that if the elective share is still not fully satisfied after the application of all of the above, then any remaining unsatisfied balance shall be satisfied from direct recipients of protected charitable lead interests as long as the contribution does not disqualify the charitable trust from a deduction under the United States gift law.

Timetable for Filing for the Elective Share

It amends s. 732.2135, F.S., by removing the court's authority to assess fees and costs to a surviving spouse who withdraws an election. The RPPTL section states that this change is intended to encourage spouses who make a protective election to withdraw the election if it is later determined that it will not be pursued. It adds a new subsection that gives the court authority to assess fees and costs if it determines that a spouse makes an election in bad faith.

¹⁶ *Id.*

Property Exempt from Claims

The bill amends s. 732.402, F.S., to update the current allowances under exempt property. It changes the value of household furniture, furnishings, and appliances from \$10,000 to \$20,000 as of the date of death. It limits the number of motor vehicles to two and defines motor vehicle as a vehicle that individually does not have a gross vehicle weight in excess of 15,000 pounds. It expands the coverage of prepaid college tuition to include all qualified tuition programs under s. 529 of the Internal Revenue Code.

Probate of Small Estates

The bill amends s. 735.203, F.S., to clarify that the petition for summary administration must be signed and verified by the surviving spouse, if any, and any beneficiaries, except that the joinder in a petition for summary administration is not required of a beneficiary who will receive full distributive share under the proposed distribution. Any beneficiary not joining shall be served by formal notice with the petition. The RPPTL section states that the provisions of s. 735.203, F.S., are not clear on what the proper notice procedure is in situations where the petitioner for summary administration is also the trustee of a trust that is a beneficiary of the decedent's estate. The RPPTL also state that judges addressing petitions for summary administration have expressed concern whether the notice provisions in s. 731.303, F.S., are applicable in connection with summary administration proceedings.

Florida Uniform Disclaimer of Property Interests Act

The bill amends various sections of ch. 739, F.S., as an effort by the RPPTL section to protect licensed attorneys from inadvertently disqualifying certain post-mortem disclaimers under s. 2518 of the Internal Revenue Code. It also modifies other provisions to allow for consistency, and it adds a provision to ensure that the traditional statutory prohibition on disclaimers by insolvent beneficiaries remains intact.

Technical/Conforming Changes

The bill also makes technical and conforming changes to the following sections of the Florida Statutes: 733.201, 733.504, 733.602, 660.417, 736.0802, and 895.02.

Effective Date

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.